

NLRB Vacates Hy-Brand Joint Employment Liability Standard Because of Board Member Conflict

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On February 26, 2018, the National Labor Relations Board vacated its recent ruling in the *Hy-Brand Industrial Contractors, Inc.* case that had set a new standard for determining joint employer status. The action was not for substantive reasons. Instead, it was due solely to a conflict that arose because one of the Board members who decided the case, William Emanuel, had previously worked for a law firm that had represented a party in the case. By a 3-0 vote (in which Emanuel did not participate), the Board ruled that Emanuel should have been disqualified from participating in the case, and, accordingly, vacated the ruling.

Because the *Hy-Brand* case has been vacated, the controversial *Browning-Ferris* standard once again controls. Unlike *Hy-Brand*, *Browning-Ferris* required only that an entity exercise “indirect control” over the terms and conditions of employment at the other entity for them to be considered “joint employers” and thus jointly liable for any labor violations. (For a discussion of the Board’s joint employer rulings, please see our previous alerts dated December 22, 2017 and August 28, 2015.)

The reinstatement of the old standard is likely only temporary, but the timetable for a new decision is unknown. The author of the decision, former Board Chair Philip Miscimarra, has since left the Board because his term expired, and John Ring, whom President Trump has nominated to replace him, has not yet been confirmed by the Senate. It is uncertain when the next opportunity for the Board to reconsider the joint employer test will arise.

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